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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ASARCO INCORPORATED (FORMERLY THE AMERICAN SMELTING AND REFINING COMPANY), *Appellant*,

v.

IDAHO STATE TAX COMMISSION, *Appellee*.

Appeal From The Supreme Court Of Idaho

REPLY BRIEF OF APPELLANT

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Appeal From The Supreme Court Of Idaho

REPLY BRIEF OF APPELLANT[1]

This brief responds to arguments advanced by the Idaho State Tax Commission ("Idaho") in its brief and by the Multistate Tax Commission ("MTC") in its *amicus* brief.

I. TREATMENT OF DIVIDEND INCOME

This Court has twice held that "the linchpin of apportionability in the field of state income taxation is the unitary-business principle." *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U.S. 425, 439 (1980) (hereinafter "*Mobil*"); *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U.S. 207, 223 (1980). In its brief, Idaho has acknowledged (Id. Br. 29) that the five dividend-paying companies "were not engaged in a

[1] As required by Rule 28.1 of the Rules of this Court, a list of appellant's subsidiaries (other than wholly owned subsidiaries) and affiliates is set forth on page (ii) of appellant's Jurisdictional Statement, and amended by page (i) of the Brief of Appellant.

single unitary business together with ASARCO." Appellant believes that Idaho has thereby conceded its case.

Idaho asserts (Id. Br. 8-9) that "functional integration between the business activities of the payor and the activities of the payee is not a constitutional requirement" for the apportionment of dividends. But Idaho concedes, as it must, that "[i]n *Mobil*, the Court looked to functional integration between Mobil's operations and the business operations of the dividend-paying subsidiaries in order to conclude that there was a connection between the intangible assets held by Mobil which generated the income and Mobil's unitary business." (Id. Br. 15-16)

As framed by *Mobil*, the issue here is whether appellant's dividends constitute apportionable profits "derived from a functionally integrated enterprise" (445 U.S. at 440) or non-apportionable profits derived from "unrelated business activity on the part of its subsidiaries and affiliates" (445 U.S. at 442). Nothing in Idaho's discussion of the facts (Id. Br. 18-21) refutes the showing in appellant's opening brief (pp. 18-25) that the operations of the five dividend-paying companies were "distinct" and "separate" (445 U.S. at 439, 441) from appellant's unitary business operations in the United States. As previously stated, Idaho has conceded (Id. Br. 29) that the five dividend-paying companies "were not engaged in a single unitary business together with Asarco." Under *Mobil*, the dividends are therefore not apportionable.

In an effort to sidestep *Mobil*, Idaho and the MTC both assert (Id. Br. 8-9, 13; MTC Br. 12) that appellant's stock investments are valuable intangible assets of appellant's own business, with the result that dividends paid on those investments are properly taxable in the States where appellant does business. This argument proves too much. If the "[f]inancial power inherent in possession of assets" provided a sufficient basis for apportioning dividends, as Idaho and the MTC

imply (Id. Br. 14 citing *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331, 336 (1939); Id. Br. 20, n.10; MTC Br. 12), then *all* income from significant stock investments would be apportionable. See MTC Br. 11-12, n.22. That conclusion is obviously not the holding of this Court in *Mobil*,[2] and, consequently, the argument must be rejected.

The cases cited by Idaho and the MTC with respect to the state tax treatment of intangible assets provide no support for the assertion that the dividend income in issue here may be apportioned simply because appellant's stock investments were valuable, and therefore important, intangible assets. In particular, Idaho and the MTC place considerable reliance on *Adams Express Co.* v. *Ohio State Auditor*, 165 U.S. 194, *reh'g denied*, 166 U.S. 185 (1897), which they cite (Id. Br. 13; MTC Br. 24) for the proposition that income from intangibles may be apportioned wherever the recipient is conducting its business. But the case does not support this broad generalization. In *Adams Express*, this Court considered the constitutionality of an Ohio property tax imposed on the property of telegraph, telephone, and express companies in Ohio. The value of property in Ohio was determined by multiplying the fair market value of the capital stock of the corporation by a fraction, the numerator of which was the amount of tangible property in Ohio, and the denominator of which was the amount of tangible property everywhere. It is important to note, however, that the intangible property apportioned in *Adams Express* consisted of goodwill and franchises of the corporation. It is hard to imagine intangibles more clearly integrated with the underlying business of the corporation. Clearly, there is no parallel between the apportionment of goodwill in that case and the income from

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[2] "We do not mean to suggest that all dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does business." *Mobil*, 445 U.S. at 441-442.

stock investments of the type involved here.[3] Indeed, to the extent that the opinion in *Adams Express* referred to stocks and bonds, the opinion supports *appellant's* position. In this regard, the Court stated (166 U.S. at 222-223):

> It is suggested that the company may have bonds, stocks, or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities. If half of the property of the Adams Express Company, which by its own showing is worth $16,000,000 and over, is invested in United States bonds, and therefore exempt from taxation, *or invested in any way outside the business of the company* and so as to be subject to purely local taxation, let that fact be disclosed, and then if the state of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company. That if such facts exist they must be taken into consideration by a state in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this court. (Emphasis supplied.)

Idaho also cites (Id. Br. 13-14) *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911), as another instance where the apportionment of intangibles was upheld. In fact, that case involved the imposition of a *federal* excise tax on corporations, and, thus, did not address the apportionment issue presented here. (The Court considered whether the tax satisfied the apportionment requirement of Article I, Section 9, Clause 4 of the Constitution.) Furthermore, the excise tax in issue there, which was

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[3] These comments also apply to *Ford Motor Co. v. Beauchamp, supra*, where the Court upheld a state corporate franchise tax on an amount determined by multiplying the value of the corporation's outstanding capital stock, surplus, and undivided profits by a fraction, the numerator of which was the corporation's gross receipts in Texas and the denominator of which was the corporation's total gross receipts.

based on the net income of corporations, excluded "amounts received by them as dividends upon stock of other corporations." *Flint* v. *Stone Tracy Co., supra*, 220 U.S. at 145. The opinion in *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920), similarly provides no support for the position of Idaho here. In that case, Connecticut imposed a franchise tax on corporations doing business in that State. While the tax was measured by the net income from Connecticut as determined by an apportionment formula, the apportionment of intangibles was not expressly addressed.

Finally, Idaho cites five cases (Id. Br. 15) for the proposition "that intangibles used by a business as a necessary or integral part of the business are taxable where the business activity relating to the intangibles occurs." A careful analysis of these cases, however, establishes that they provide no support for the type of income apportionment urged here. All five of the cited cases were concerned with the situs of intangibles for purposes of property or corporate excise or franchise taxes, and (as this Court noted in *Mobil*, 445 U.S. at 444-445) they are inapposite in a case like the present one involving the apportionment of income.[4] Moreover, in those cases where intangibles were

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[4] In all five cases this Court held that the tax situs of the intangibles involved was the State of commercial domicile or personal domicile of the owner of the intangibles. See *First Bank Corp.* v. *Minnesota*, 301 U.S. 234 (1937) (stock is taxable by the State where the shareholder's principal business office is located); *Wheeling Steel Corp.* v. *Fox*, 298 U.S. 193 (1936) (bank deposits and accounts receivable are taxable by the State where the corporation's general business office is located); *First Nat. Bank* v. *Maine*, 284 U.S. 312 (1932) (stock held by a decedent is subject to death transfer tax only by the State where the decedent was domiciled); *Beidler* v. *South Carolina Tax Commission*, 282 U.S. 1 (1930) (notes held by a decedent are subject to inheritance tax only by the State where the decedent was domiciled); *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U.S. 204 (1930) (same result). None of these cases involved the apportionment of income, and none supports the assertion of Idaho (Id. Br. 17) and the MTC (MTC Br. 12-13, n.24) that intangibles "have no fixed situs" and can therefore be apportioned to all States where the taxpayer does business.

treated as "integral" parts of the taxpayer's business, the relationships were much closer and more direct than the relationships involved here.[5]

The MTC also relies (MTC Br. 24) on *Harvester Co.* v. *Dept. of Taxation*, 322 U.S. 435 (1944) and *Wisconsin* v. *J.C. Penny Co.*, 311 U.S. 435 (1940). Neither decision provides support for the apportionment urged here. Both cases involved a Wisconsin tax imposed on domestic and foreign corporations doing business within the State. The tax was imposed "[f]or the privilege of declaring and receiving dividends, out of income derived from property located and business transacted" in Wisconsin; it was payable when the corporation paid dividends and was measured by the portion of the dividends paid out of surplus attributable to Wisconsin earnings. See *Wisconsin* v. *J.C. Penny Co.*, *supra*, 311 U.S. at 440, n.1. In the *Penny* case, the

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[5] In *Wheeling Steel Corp.* v. *Fox*, *supra*, the intangibles consisted of bank deposits and accounts receivable arising directly out of the taxpayer's regular business transactions. In *First Bank Corp.* v. *Minnesota*, *supra*, the intangibles consisted of the stock of banking subsidiaries wholly owned and controlled by a bank holding company. The parent holding company conducted an "integrated business" (301 U.S. at 234) by advising its subsidiaries on loans, commercial paper transactions, interest rates, and the purchase and sale of securities, in addition to planning advertising campaigns and supplying advertising material. In the present case, by contrast, the Court below held (J.S. App. A, 22a-23a) that appellant's 53% stock investment in M.I.M. was "acquired and maintained . . . as an integral and necessary part of [appellant's] mining and smelting business" purely and simply because appellant owned "a majority of [the] M.I.M. stock" and was "engaged in virtually the same [line of] business" as M.I.M. Because appellant "operated independently" of M.I.M., did "little if any business" with M.I.M. and "did not exercise its right to control" M.I.M. (*ibid.*), the relationship between appellant and M.I.M. is clearly distinguishable from the parent-subsidiary relationship in *First Bank Corp.* v. *Minnesota*, *supra*. To varying degrees, the same is true of appellant's relationship with the four other dividend-paying companies. See appellant's opening brief, pp. 18-25.

Court upheld the tax as an additional tax on the corporate payor, stating (311 U.S. at 442):

> The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends.

In *Harvester Co.* v. *Dept. of Taxation, supra*, the Court treated the tax as a withholding tax imposed on the nonresident shareholders (rather than the corporate payor), but still upheld the right of Wisconsin to tax the dividends to the extent paid out of Wisconsin earnings. If anything, *Harvester* supports appellant's position here because the dividend tax on the nonresident shareholders was upheld in that case by looking to the "underlying activity" of the *payor* corporation to determine where the dividends were earned. See *Mobil*, 445 U.S. at 440.

In sum, there is no basis in this Court's prior opinions for contesting appellant's interpretations of *Mobil*. To the contrary, the cases seem to anticipate the "functional integration" test of *Mobil*. See, *e.g.*, *First Bank Corp.* v. *Minnesota, supra*, and *National Leather Co.* v. *Massachusetts*, 277 U.S. 413 (1928), in which this Court upheld the right of a State (other than the State of legal domicile) to impose a property or excise tax on a parent corporation's stock holdings in its subsidiaries. In both cases the businesses of the parent and the subsidiaries were closely integrated in a functional sense. In *National Leather*, for example, leather hides purchased by the parent were tanned and sold for its account by two subsidiaries operating in Massachusetts where the parent had its business headquarters. Under these circumstances, this Court held that Massachusetts was entitled to treat the stock of the subsidiaries as assets used by the parent in its Massachusetts business, stating (277 U.S. at 423-424):

> On the contrary, looking to the substance of the transactions and not merely to form, we think that the petitioner,

through its ownership of the capital stock of the two subsidiary corporations and the control which it thereby exercised over them, did, in a very real and practical sense, employ these stocks as an instrumentality in carrying on its business within Massachusetts — to the extent, at least, that the controlled activities and property of the subsidiary corporations were within the state.

II. TREATMENT OF INTEREST AND CAPITAL GAINS

Because the "[i]nterest income and gains [at issue] were earned from the . . . same intangibles" that generated the dividend income, Idaho agrees (Id. Br. 21) that "the same result should obtain." The interest and capital gains should therefore be excluded from the apportionable income base for the same reasons that the dividends are excluded.

III. ADJUSTMENT OF THE APPORTIONMENT FORMULA

In its opening brief, appellant argued in the alternative (pp. 27-48) that if some of the dividends, interest, and capital gains are included in apportionable business income, both the Due Process Clause and the Foreign Commerce Clause will be violated unless a correlative adjustment is made to Idaho's apportionment factors.

1. In response to appellant's due process argument, Idaho argues, in substance, that only the income of appellant is involved, and, therefore, only the property, payroll, and sales of appellant need to be included in the apportionment factors. (Id. Br. 26-27, 34, 38-39).

In *Mobil*, this Court expressly refrained from deciding whether the inclusion of dividends in apportionable income necessitates a correlative adjustment to the apportionment for-

mula. *Mobil*, 445 U.S. at 434, 441, n.15, and 449.[6] However, the clear thrust of the Court's opinion in *Mobil* is that the form of business organization should not affect the scope of a State's taxing power. If appellant had derived income from unincorporated unitary businesses in which it had a joint venture interest, appellant's share of the property, payroll, and sales of those businesses would clearly have been included in the apportionment formula. "Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives." *Mobil*, 445 U.S. at 441. See also 445 U.S at 459-461, Stevens, J., dissenting.

Idaho (Id. Br. 28-32) and the MTC (MTC Br. 17-22) respond to that argument by erroneously equating appellant's proposal to adjust the apportionment formula with the concept of worldwide combined reporting. Idaho and the MTC misconstrue appellant's argument. Under worldwide combined reporting, income earned by affiliated corporations must be included in the shareholder-corporation's apportionable income in computing state taxes whether or not the income of the affiliates has been distributed to the parent corporation. Under that system, the property, payroll, and sales of a unitary subsidiary are combined with the property, payroll, and sales of the parent corporation.[7] Under the Idaho apportionment formula at issue

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[6] Idaho's argument (Id. Br. 26) that no adjustment of the apportionment formula is required as a matter of law because such an adjustment was not made in *Mobil* is without merit. The question whether the apportionment formula had to be changed was not in issue in that case: "Appellant, we reiterate, took this appeal on the assumption that Vermont's apportionment formula was fair." *Mobil*, 445 U.S. at 441, n.15.

[7] The question whether a State can require a corporate taxpayer to report its taxable income on the basis of the worldwide combined reporting system is before this Court in *Chicago Bridge & Iron Company* v. *Caterpillar Tractor Co., Illinois Department of Revenue et al., prob. juris. noted,* _____ U.S. _____, No. 81-349. That reporting system is not at issue here.

here, only that income which is actually distributed by the subsidiary to the parent corporation is included in apportionable business income. Under that system, appellant contends that a concomitant percentage of the property, payroll, and sales of the subsidiary must be included in the apportionment factors.[8] Whether the subsidiary's income is taken into account by the parent immediately (under combined reporting) or only as distributed (under the apportionment method involved here), the due process considerations are the same. In either case, the taxing State's share of the reported income will inevitably be overstated if the out-of-state property, payroll, and sales generating the reported income are not included in the apportionment fraction.

Idaho's assertion (Id. Br. 34) that under the apportionment method Idaho's "share [of apportionable income] cannot be zero or less than zero" is plainly misconceived. Idaho wants a system of apportionment under which it can only benefit. But the inherent nature of apportionment is such that if the operations outside the taxing State are less profitable, on a separate accounting basis, than the operations in the State, an apportionment calculation based on the total profits everywhere will *reduce* the amount of income that is attributed to the operations in the State. See, *e.g.*, *Superior Oil Co.* v. *Franchise Tax Bd.*, 60 Cal.2d 406, 386 P.2d 33 (1963).

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[8] As appellant pointed out in its opening brief (p. 36), the amount of property, payroll, and sales of the dividend-paying corporations that is included in the apportionment formula will depend on the percentage of income of the dividend-paying corporations that is distributed as dividends. Since this is a question of first impression, there is no established mechanism to implement the adjustment. That is why appellant initially suggested (p. 36, n.29) a remand on this issue if the Court holds that adjustment is necessary. The problems Idaho raises (Id. Br. 34-35, 38) may be resolved at that point.

Idaho's conclusion (Id. Br. 33-34) that under some factual circumstances it may be better off without apportionment should therefore come as no surprise. For example, if Corporation X operates a division in Idaho that earns $1,000 of taxable income and a second unitary division in Colorado that earns $900 (using the same amount of property, payroll, and sales as the division in Idaho), Idaho will maximize its revenue if Corporation X reports its income using separate accounting concepts. Under the apportionment method, only $950 of the income will be allocated to Idaho. As explained above, the fact that the two divisions are incorporated and operated as separate corporate entities should not change the tax result. Thus, if Idaho requires apportionment, as it has done in the present case, Idaho must bear the risk that its revenue may be "*less* than if dividends are totally excluded from apportionable income." (Id. Br. 34; emphasis in original.)

The example on which Idaho relies (Id. Br. 35-38) was fully refuted in appellant's opening brief (p. 33, n.27). Idaho does not — because it cannot — come to grips with appellant's basic assertion that it is a *per se* violation of the Due Process Clause for a State which uses the three-factor apportionment formula to include income from out-of-state sources in a taxpayer's apportionable income without reflecting in some meaningful fashion the out-of-state property, payroll, and sales which generated that income. For the reasons stated in appellant's opening brief (pp. 31-32), such a procedure necessarily produces a "rate of return" for the taxing State which is greater than the rate of return for the unitary business as a whole. In the present case, Idaho asserts (Id. Br. 23, n.13) that its claimed rate of return on Idaho property is "modest" and "entirely consistent with reasonable expectations." What Idaho fails to acknowledge is that its claimed rate of return greatly exceeds the overall rate of return. For example, in 1969, the total property taken into account by Idaho was $549,581,211 (J.A. 71a). That property

generated total operating income of $30,794,263.[9] Thus, the overall rate of return on the total property taken into account by Idaho was 5.6%.[10] But by including the dividends in apportionable income without increasing the total property account to reflect the out-of-state property generating that income, Idaho claimed a rate of return equal to 15.07% of the Idaho property. (Id. Br. 23, n.13)

As mathematically demonstrated in appellant's opening brief (pp. 33-34 and n.28), formulary apportionment *requires* that the taxing State receive the same rate of return that is earned by the entire business as a whole. Idaho's attempt to increase its rate of return to nearly three times the average rate of return is a clear violation of due process.

It is no defense to say, as Idaho does (Id. Br. 34-35, 38), that adjusting the apportionment formula may involve conceptual and administrative problems. If this Court establishes the basic principle that appropriate adjustment is required, it is certainly not beyond the capacity of the parties and the state courts to apply the principle in various factual contexts.[11]

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[9] Of the total income of $89,823,717 taken into account by Idaho (J.A. 67a), $59,029,454 consisted of investment income derived from property not included by Idaho in the total property account (see J.A. 69a-71a; Appellant's Brief, Appendix B, 5a). The difference of $30,794,263 is the total unitary income generated by the total property taken into account by Idaho.

[10] $30,794,263 ÷ $549,581,211 = .056.

[11] The MTC has not helped matters by presenting examples (MTC Br. 18-22) which contain errors and relate to a factual situation not present here. The combined reporting calculation on the top of page 20 of the MTC brief is erroneous because it includes Corporation B's property, payroll, and sales in the denominators, but not in the numerators, of the apportionment fractions. The example on page 21, and the conclusions drawn from it by the MTC, are incorrect for the same reason. Moreover, all of the MTC's examples are really irrelevant here because all of them involve cases where the taxpayer has received dividends from another corporation doing business in the taxing State. The five dividend-paying corporations involved in this case had no operations or assets of any kind in Idaho. (J.A. 49a; Appellant's Brief 5)

2. Finally, Idaho challenges (Id. Br. 39-46) appellant's assertion that the Foreign Commerce Clause requires that adjustments be made to the apportionment formula to prevent multiple taxation of the same income by foreign governments and the State. [12] In substance, Idaho argues (Id. Br. 41-43) that since no U.S. treaty or federal statute specifically prohibits it from taxing foreign-source dividends, Idaho is free to impose an income tax on those dividends. As explained in appellant's opening brief (pp. 42-45), well-established principles of international law, numerous United States tax treaties, and the Internal Revenue Code all recognize the primary right of the source nation to tax dividend income. [13] A specific statute or treaty prohibiting similar taxation at the local level is not a prerequisite, since it is the Constitution in this instance that places a restriction on Idaho's taxing power. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979) (hereinafter "*Japan Line*"). [14]

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[12] Idaho also questions the scope of appellant's argument on this issue. (Id. Br. 40, n.18) As stated in appellant's opening brief (pp. 39-40), appellant was subject to foreign tax on the dividends it received from M.I.M. and Mexicana, and on the interest it received on a Mexican note issued in connection with a prior sale of Mexicana stock. Appellant's Foreign Commerce Clause argument therefore focuses on these items. The risk of multiple foreign and state taxation also exists with respect to the earnings appellant derived from Peru. However, appellant's Foreign Commerce Clause argument does not apply to the income which appellant received from General Cable and Revere, both of which are domestic corporations operating in the United States (J.A. 135a).

[13] Idaho acknowledges (Id. Br. 44) that the purpose of the federal foreign tax credit provisions is "to avoid duplicative taxation at the *national* level of earnings derived from sources outside of the United States." By that statement, Idaho implicitly acknowledges that double taxation will occur if it taxes foreign-source dividends that are subject to foreign tax.

[14] There was no federal statute or U.S. treaty in *Japan Line* that expressly prohibited local jurisdictions from imposing ad valorem property taxes on the shipping containers, and, thus, *Japan Line* cannot be distinguished on that basis. It is true that Article 2 of the Customs Convention on Containers

Idaho attributes too much significance (Id. Br. 42-43 and n.19) to Congressional inaction. The failure of Congress to act should not be construed as approval of the status quo. See *Japan Line*, 441 U.S. at 454; *United States* v. *Underwriters Assn.*, 322 U.S. 533, 556-561 (1944). For example, the fact that Congress repeatedly failed to approve the Multistate Tax Compact did not prevent this Court from upholding the constitutional validity of the Compact in *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 458 (1978). Similarly, Congressional failure to enact legislation prohibiting state taxation of foreign-source dividend income should not prevent this Court from upholding and applying the *constitutional* restraints on multiple taxation of income from foreign commerce. As the Court stated in *Japan Line* (441 U.S. at 454), the States are not "free to impose demonstrable burdens" on foreign commerce simply because Congress has not "pre-empted the field by affirmative regulation." Thus, if Congress wants to sanction multiple taxation of foreign income by the States, it can do so only by taking affirmative legislative action under its Commerce Clause powers. There are simply too many possible explanations of Congressional inaction to regard it as signifying that a majority of the members of both Houses approve of existing practices. [15]

(20 U.S.T. 301; T.I.A.S. No. 6634) prohibits treaty countries from imposing "import duties and import taxes" (*Japan Line*, 441 U.S. at 446, n.10), but if the Los Angeles property tax at issue in *Japan Line* had constituted an import duty, it would have been struck down under Article I, Section 10, Clause 2 of the Constitution. Thus, contrary to Idaho's argument, the fact that Idaho is not expressly covered by U.S. tax treaties and the fact that no federal statute specifically prohibits the contemplated taxation does not distinguish *Japan Line* from the present case.

[15] Idaho also relies (Id. Br. 42, n.19) on the fact that the Senate failed to ratify the Income Tax Convention between the United Kingdom and the United States, signed on December 31, 1975, until Article 9(4), which prohibited the States from using the "worldwide combination/unitary

Idaho argues (Id. Br. 41; see also MTC Br. 26) that appellant's reliance on *Japan Line* is misplaced because that case is limited to property taxes. This Court in *Japan Line* went to great lengths to point out that in the area of property taxation a theory of apportionment, analogous to income tax apportionment, has developed for instrumentalities of interstate commerce that have a temporary situs in several States. *Japan Line*, 441 U.S. at 441-447. Whether the tax in issue is a property tax or an income tax, approval of the apportionment theories used for those taxes has been premised on this Court's "ability to enforce full apportionment by all potential taxing bodies." *Japan Line*, 441 U.S. at 447. The problem confronted in *Japan Line*, with respect to a property tax, and the problem presented here, with respect to an income tax, is whether a fair apportionment can be obtained when one of the taxing bodies is a foreign nation. "[N]either this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign."

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method of apportioning income" in determining the taxable income of British multinational corporations, was deleted. Idaho argues that the refusal of the Senate to ratify that provision refutes appellant's argument that established policy necessitates adjustment of the apportionment factors. Idaho reads too much into the Senate's action. The Report of the Senate Foreign Relations Committee makes it clear that the Senate objected primarily to the means chosen to implement that policy and not to the policy itself. The Report states (Ex. Rept. 96-5, 96th Cong., 1st Sess. 6 (1979)):

> During last year's debate both in the Foreign Relations Committee and on the Senate floor, opponents of Article 9(4) argued that any prohibition of the right of states to use worldwide combination under the unitary tax system should be addressed legislatively rather than through the treaty process. Even some supporters of Article 9(4), while not questioning the propriety of the Article, indicated their preference for Congressional consideration through the legislative process of the issue.

Indeed, Senator Church's proposal to delete Article 9(4) was defeated in committee and on the floor of the Senate. Ex. Rept. 96-5, 96th Cong., 1st Sess. 2 (1979). That provision was deleted only after the treaty failed to obtain the necessary two-thirds vote for ratification.

Japan Line, 441 U.S. at 447. "Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state tax . . . may subject foreign commerce 'to the risk of a double tax burden to which [domestic] commerce is not exposed, and which the commerce clause forbids.' " *Japan Line*, 441 U.S. at 447-448. Because of that threat, the interest of a State in maximizing its revenue must give way to the paramount interest of the United States and to the constitutional right of a taxpayer to be free from burdensome multiple taxation. That is the holding of *Japan Line*. Those considerations have equal force whether the tax concerned is imposed on property or on income. See also the *Amicus Curiae* Memorandum of the United States in *Chicago Bridge & Iron Company* v. *Caterpillar Tractor Co., Illinois Department of Revenue et al., prob. juris. noted,* ____ U.S. ____ , No. 81-349.

CONCLUSION

For the foregoing reasons and for the reasons stated in appellant's opening brief, this Court should reverse the decision below and remand the case to the Supreme Court of Idaho for further proceedings.

Respectfully submitted,

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